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IN THE

Supreme Court of the United States

October Term 1975

No. 74-1457

SUMITOMO FORESTRY CO. LTD., OF JAPAN,
Petitioner,

v.

THURSTON COUNTY, WASHINGTON,
Respondent.

PETITION FOR REHEARING

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PETITION FOR REHEARING

Comes now, Sumitomo Forestry Co. Ltd., of Japan (hereinafter Sumitomo) and petitions this Court pursuant to Supreme Court Rule 58(1) for a rehearing of the order entered herein on October 6, 1975 denying the Writ of Certiorari. On November 13, 1975, Associate Justice Brennan entered an order extending the time for filing this petition to and including December 30, 1975.

I. Introduction

In this matter a single issue is presented. When do goods destined for overseas delivery enter the stream of foreign commerce and thereby acquire the status of exports within the meaning of the Import-Export Clause of the United States Constitution (Art. I, §10, Cl. 2)? Prior decisions of this Court have held that goods enter foreign commerce

when they have begun their final movement for transportation from the state of their origin to their foreign destination or have been committed to a common carrier for that transportation. *Kosydar v. National Cash Register Co.*, 417 U.S. 62 (1974).

This issue has been before this Court most often in situations involving attempts by state or local taxing authorities to levy taxes on goods which eventually reach overseas destinations. However, the importance of the definition, in this instance, extends beyond the taxable status of the goods involved. This Court has held that the protection of the Import-Export Clause extends to the handling of goods in foreign commerce by stevedoring companies, *Joseph v. Carter & Weekes S. Co.*, 330 U.S. 422 (1946), *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90 (1937). Similarly, stamp taxes on charter parties and policies of marine insurance were held unconstitutional where they were directly involved with foreign commerce. *U.S. v. Hvoslef*, 237 U.S. 1 (1915), *Thames & M. Marine Ins. Co. v. U.S.*, 237 U.S. 19 (1915). Also, the definition of "foreign commerce" governs the jurisdiction of the Interstate Commerce Commission where goods are transported entirely within the borders of a state to an export port in the same state. *Southern P. Terminal Co. v. I.C.C.*, 219 U.S. 498 (1910), *Texas & N.O.R. Co. v. Sabine Tram Co.*, 227 U.S. 111 (1913), *Railroad Commission v. Texas & P. R. Co.*, 229 U.S. 336 (1913).

Petitioner submits that the decision of the Ninth Circuit in the case at bar overrules the prior decisions of this Court as they relate to the jurisdiction of the I.C.C. The decision below makes a distinction between goods which originated

outside the exporting state and those which originated inside the exporting state, holding that the former are in foreign commerce when they begin their actual movement to their foreign destination, while the latter do not enter foreign commerce until they have physically been loaded aboard the exporting carrier. This facet of the Ninth Circuit decision has not previously been discussed by Petitioner.

As Petitioner noted in its Supplemental Brief, the decision in the case at bar cannot be reconciled with the decision of the Washington State Supreme Court in *Carrington Co. v. Dep't. of Revenue,* 84 Wn.2d 444, 527 P.2d 74 (1974), which held that goods which had been on a prior *intra*state journey had entered foreign commerce before they had been put aboard the exporting carrier. Certiorari was denied in that case by this Court. Petitioner was unaware, however, that the California Supreme Court in *Farmers' Rice Coop. v. County of Yolo,* 14 Cal.3rd 616, 536 P.2d 465 (1975) had followed the reasoning of the Ninth Circuit in the case at bar and thereby created an irreconcilable conflict between the standards which will be applied to goods in the States of California and Washington. The California decision holds that goods which have been on a prior *inter*state journey are exports when they have begun their actual movement toward their foreign destination, but that those which have been on a prior *intra*state journey enter foreign commerce only when they have been loaded aboard the exporting carrier.

It is obvious that the ultimate decision in the case at bar will have a serious impact far beyond the boundaries of Thurston County, Washington, and the logs which are owned by Petitioner herein.

II. The Decision of the Ninth Circuit Will Limit the Jurisdiction of the Interstate Commerce Commission.

As stated above, the decision of a panel of the Ninth Circuit would eliminate the jurisdiction of the Interstate Commerce Commission over the transportation of goods which travel only within the boundaries of the exporting state in a continuous journey to the port. If such transportation is characterized as intrastate commerce, the state controls the conditions under which that commerce is conducted. The previous decisions of this Court have held that such transportation is in foreign commerce and is therefore subject to regulation by the Interstate Commerce Commission.

In *Southern P. Terminal Co. v. I.C.C., supra,* this Court sustained the jurisdiction of the I.C.C. over facilities of import and export traffic at Galveston, Texas. Those facilities were used to process goods bound for foreign countries which had been brought to Galveston from points within Texas. This Court reasoned that:

> ". . . The case, therefore, comes under *Coe v. Errol,* 116 U.S. 517, 29 L.Ed. 715, 6 S.Ct. 475, where it is said that goods are in interstate, and necessarily as well in foreign, commerce when they have 'actually started in the course of transportation to another state or been delivered to a carrier for transportation' . . . ." [219 U.S. 498 at 527]

The panel of the Ninth Circuit below also relied upon the decision in *Coe v. Errol,* 116 U.S. 517 (1886), but reaches the opposite conclusion by holding that goods which travel wholly within the boundaries of a state do not enter foreign commerce until they are loaded aboard the exporting carrier.

If the logs owned by Petitioner were not in foreign commerce and were therefore subject to a local tax, then the I.C.C. could not regulate either their transportation to the port or the rates charged at the port itself.

In *Texas & N.O.R. Co. v. Sabine Tram Co., supra,* forest products were taken by rail from Ruliff, Texas to the port at Sabine, Texas for shipment overseas. This Court held the rail transportation to be part of foreign commerce and therefore subject to the jurisdiction of the I.C.C. Sixteen years later in *Carson Petroleum Co. v. Vial,* 279 U.S. 95 (1929), this Court held that oil stored in tanks at the port was not subject to local taxation because it was in foreign commerce. This Court held that the decision in *Sabine* could not be distinguished from the *Carson* facts.

The panel of the Ninth Circuit, in the present case, did not mention the *Sabine* case and distinguished the *Carson* case on the sole ground that the oil had been on a prior *inter*state journey while Petitioner's logs had travelled wholly within the borders of the State of Washington.

In *Railroad Commission v. Texas & P. R. Co., supra.,* shipments from within the State of Louisiana were transported by rail to the City of New Orleans for shipment to foreign countries. This Court defined the issue as follows:

> "The sole question in the case is whether the shipments were foreign or intrastate commerce; or, speaking more accurately, whether they were within Federal or state jurisdiction. . ." [229 U.S. 336 at 340]

The Court held that the shipment, although entirely within Louisiana, was foreign commerce and thereby sustained the jurisdiction of the I.C.C. over the transportation.

This Court has never distinguished "foreign commerce"

as it relates to I.C.C. jurisdiction and "foreign commerce" as it relates to the taxable status of goods. The decisions defining the jurisdiction of the I.C.C. have been cited with approval in cases involving the taxable status of goods. The best example of this cross-over is perhaps *Spalding & Bros. v. Edwards,* 262 U.S. 66 (1923), a case which involved a tax on the goods. There, Justice Holmes, in attempting to define foreign commerce under the Import-Export Clause, cited with approval cases which defined the jurisdiction of the I.C.C., *Texas & N.O.R. Co., v. Sabine Tram, supra., Railroad Commission v. Texas & P. R. Co., supra.,* cases which dealt with taxes on policies of marine insurance and on charter parties. *Thames & M. Marine Ins. v. U.S., supra., U.S. v. Hvoslef, supra.,* as well as cases dealing with the taxable status of goods. Most recently, in *Joy Oil Co. v. State Tax Commission,* 337 U.S. 286, at page 288, this Court again cited with approval the decisions in *Southern P. Terminal v. I.C.C., supra.,* and *Texas & N.O.R. Co. v. Sabine Tram Co., supra.,* in support of its definition of "foreign commerce" under the Import-Export Clause.

The cases defining the jurisdiction of the I.C.C. held specifically, that goods transported on a continuous route or journey from an interior point in a state to the export port within the same state, were in foreign commerce during that journey and therefore, were subject to the jurisdiction of the I.C.C. The decision of the Ninth Circuit in the case at bar specifically holds that such goods do not, and cannot, enter foreign commerce until such time as they have completed their journey and have been physically loaded aboard the exporting carrier. The immediate result of the decision in the case at bar is to hold that the logs herein are subject to a personal property tax by Thurston County,

Washington; however, the impact of this decision upon the jurisdiction of the Interstate Commerce Commission cannot be ignored. It is submitted that any decision which would drastically alter the jurisdiction of the Interstate Commerce Commission must emanate from this Court and not from a panel of the Ninth Circuit Court of Appeals.

III. There Now Exists an Irreconciliable Difference Between the Applicable Standard in the States of Washington and California as a Result of the Decision in the Case at Bar.

Prior to the decision of the Ninth Circuit in the case at bar, no decision of any other court dealing with foreign commerce has attached any special importance to the origination point of the goods. In *Spalding & Bros. v. Edwards, supra.*, this Court held that the protection of the Import-Export Clause was available to goods when the exporting carrier gained physical control over them. In that case, there is no mention of the origination points of the goods. In *Carson Petroleum Co. v. Vial, supra.*, this Court struck down a tax on oil stored in tanks at the port and while that oil did originate in other states, this Court found that the decision in *Texas & N.O.R. Co. v. Sabine Tram Co., supra.*, was controlling. *Sabine* dealt solely with transportation within the State of Texas. Similarly, *Richfield Oil Corporation v. State Board of Equalization*, 329 U.S. 69 (1946) held that the protection of the Import-Export Clause was available to oil no later than the time when the oil was delivered into the physical control of the exporting carrier. In that case, the oil had been refined in the State of California and had been piped to storage tanks at the port. In speaking for the Court, Justice Douglas very carefully said that the protection of the Import-Export Clause began

no later than the delivery of the oil to the vessel; however, under the decision of the Ninth Circuit in the case at bar, the Court explicitly states that the logs involved herein were not entitled to the protection of the Import-Export Clause any earlier than the time they are loaded aboard the exporting vessel.

At almost the identical time the Ninth Circuit rendered its decision in the case at bar, the Washington State Supreme Court rendered its decision in *Carrington Company v. Department of Revenue, supra.* The Washington Court held that the protection of the Import-Export Clause was available to goods which were loaded aboard trucks and shipped a distance of approximately sixty miles where they were then repackaged and inspected and were shipped overseas after a delay of approximately one week. This transportation occurred entirely within the State of Washington. The Washington Court held that the protection of the Import-Export Clause attached to the goods at the time that they were loaded aboard the trucks and this marked the entrance of the goods into the stream of foreign commerce.

On June 23, 1975, the Supreme Court of California announced its decision in *Farmers' Rice Coop. v. County of Yolo, supra.* The California Court adopted the prior interstate v. intrastate distinction established by the Ninth Circuit in holding that goods which originated within California were not entitled to the protection of the Import-Export Clause until such time as they had been loaded aboard the exporting carrier. The *Farmers' Rice,* and the *Carrington* cases are completely irreconcilable. There ex-

ists no substantive factual differences between the cases, yet they have reached completely opposite conclusions. Without guidance from this Court two completely irreconcilable sets of criteria will be used and applied to the United States Constitution by the Courts of Washington and California.

Further, this Court has denied a writ of Certiorari in the *Carrington* case, Supreme Court Number: 75-1238, dated May 19, 1975. It should be noted that in that case, the State of Washington, in requesting this Court to grant Certiorari, pointed out the obvious conflict between the decision in the case at bar and the decision of the Washington Court in the *Carrington* case. If this Court permits the decision of the panel of the Ninth Circuit to stand alongside the *Carrington* decision, confusion will be created where none should exist.

IV.

CONCLUSION

Over the years, both taxpayers and tax collectors have sought a definition of the scope of the protection offered by the Import-Export Clause of the United States Constitution. This Court has consistently stated the rule to be that goods have not entered the stream of foreign commerce until such time as they have begun their actual movement toward the foreign destination or have been commited to a carrier for such transportation. This rule is simple and has resulted in relatively little litigation since it was first set forth in *Coe v. Errol, supra.* It is submitted that there should not be a departure from these standards unless it can be shown that there are valid and compelling reasons for doing so.

There can be no question but that the decision of the Ninth Circuit in the case at bar is a depature from this past precedent. Yet, the Ninth Circuit offers no explanation in support of its requirement that the goods be on a prior interstate journey. The result of the distinction used by the Ninth Circuit will be that goods which originate within the exporting state will suffer discrimination. Assume that two shipments of identical goods have been transported on a continuous journey from their place of manufacture to identical locations at the same port where they await the arrival of the exporting carrier. Using the criteria of the Ninth Circuit, if one shipment began in a neighboring state it would be in foreign commerce, from the initial point of departure, and thereby tax-exempt while if the other shipment began its journey inside the borders of the exporting state, it would be subject to local taxation until it had been loaded aboard the exporting carrier. Such a result is illogical and unjust.

Further, the Ninth Circuit cites no cases in support of its distinction. In fact, the distinction is used solely for the purpose of distinguishing *Carson Petroleum Company v. Vial, supra.*, from the case at bar. Ironically, a close reading of *Carson* reveals that this Court found the decision in *Texas & N. O. R. Co. v. Sabine, supra.*, to be controlling. As noted above, *Sabine* held that goods which were shipped by rail from Ruliff, Texas to the port at Sabine, Texas were in foreign commerce during that journey. Certainly this Court in *Carson* could not have felt that the prior interstate journey was of critical importance.

It is respectfully submitted that this Court should issue the Writ of Certiorari. The conduct of the export trade

in this country is vitally important to our national economy. That trade has been conducted under relatively simple and easily understood guidelines for over one hundred years. There should be no departure from those guidelines without the express approval of this Court.

Respectfully submitted,

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